Supreme Court, U.S.
FILED
OCT 3 1988
JOSEPH E. SPANIOL, JR.
CLERK

(2)

No. 88-206

# In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT L. TUCKER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), a district court may hear ex parte a prosecutor's explanation for striking black veniremen from a jury panel.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Argument | 5 |
| Conclusion | 11 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Allen* v. *Hardy*, 478 U.S. 255 (1986) | 4-5 |
| *Batson* v. *Kentucky*, 476 U.S. 79 (1986) | 4, 5-6 |
| *Griffith* v. *Kentucky*, 479 U.S. 314 (1987) | 4 |
| *Tompkins* v. *Texas*, cert. granted, No. 86-6405, (May 16, 1988) | 11 |
| *United States* v. *Davis*, 809 F.2d 1194 (6th Cir. 1987), cert. denied, No. 86-6500 (June 22, 1987) | 5, 8 |
| *United States* v. *Garrison*, 849 F.2d 103 (4th Cir. 1988) | 9, 10 |
| *United States* v. *Thompson*, 827 F.2d 1254 (9th Cir. 1987) | 5, 8 |


Constitution and statutes:


| | |
|---|---|
| U.S. Const. Amend. XIV (Equal Protection Clause) | 4 |
| 18 U.S.C. 1343 | 2 |
| 18 U.S.C. 1014 | 2 |
| 28 U.S.C. 2255 | 2, 4, 7, 9, 10 |

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B12) is reported at 836 F.2d 334.

### JURISDICTION

The judgment of the court of appeals was entered on January 6, 1988. A petition for rehearing was denied on March 1, 1988. On May 23, 1988, Justice Stevens extended the time for filing a petition for a writ of certiorari until July 29, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was con-

victed on nine counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of presenting false statements to a federally insured bank, in violation of 18 U.S.C. 1014. He was sentenced to concurrent terms of 15 months' imprisonment on the first five counts, to be followed by five years' probation on the remaining five. He was also directed to make restitution of $5 million, subject to certain conditions. The court of appeals affirmed (773 F.2d 136 (1985)), and this Court denied certiorari (478 U.S. 1022 (1986)). On January 27, 1987, petitioner filed a motion pursuant to 28 U.S.C. 2255 to vacate and set aside his judgment of conviction and sentence. The district court denied the motion (Pet. App. C1-C3), and the court of appeals affirmed (Pet. App. B1-B12).

1. The evidence at trial is briefly summarized in the court of appeals' opinion (Pet. App. B2). It showed that co-defendant Deborah Bell, a commodities broker, was the intermediary for a fraudulent sale of 6,000 tons of black beans from a supplier in Hong Kong to a Guatemalan government agency. Petitioner, who was Bell's attorney, and co-defendant Michael Ball, a Miami freight forwarder, participated in the charged fraud. Pursuant to a sales contract, the buyer arranged for a $5 million letter of credit to be paid to Bell upon her submission of documents showing that the beans had been loaded on a vessel in Hong Kong. Bell submitted the required documents and obtained the funds. However, she and petitioner had forged the documents, and no beans were in fact shipped to Guatemala.

2. Petitioner is black. His co-defendants, Bell and Ball, are both white (Pet. App. C2). During jury selection, petitioner noted that only four of the 36 veniremen questioned in the jury box were black. Petitioner requested that the court require the prosecution to state for the

record its reasons for excusing any of the four blacks. The court reserved decision on the request. Pet. App. B5.

The government then exercised its seven peremptory challenges and struck the four black veniremen on the jury panel. Petitioner objected, asserting that the challenges were impermissibly used to exclude black persons. Petitioner renewed his request that the court require the prosecution to explain why it excused the blacks. After the prosecution told the court that it had reasons other than race for exercising its peremptory challenges, the court asked if it would state those reasons outside the presence of petitioner and his counsel. Petitioner objected to conducting the procedure ex parte. The court, however, overruled petitioner's objection. Pet. App. B5-B6.

The prosecutor explained to the district judge in an ex parte proceeding that he struck the veniremen on the basis of their education rather than their race. Because of the complicated nature of the charged fraud, the government believed that it needed well-educated jurors with business experience (Tr. 79-80). Of the four black jurors struck, only one had graduated from high school. In the prosecutor's opinion, that juror "did not appear to be particularly alert or interested" and "did not seem to have the natural capabilities that * * * are necessary" (*id.* at 79). Another struck juror had an eighth grade education and worked making brushes (*id.* at 34, 79-80); a third had attended high school but had no employment history (*id.* at 34); and a fourth apparently had some high-school level education and was self-employed in a job involving scrap metal recycling (*id.* at 54-55, 80). The prosecutor also noted that his three remaining challenges were similarly exercised to strike jurors who possessed only a high school education and lacked the business sophistication that the government deemed desirable in this case (*id.* at 80).

After considering the prosecutor's explanation, the district court concluded that race was not the criterion by which the peremptory challenges were exercised and that the government had an independent "strategic purpose" for its challenges (Tr. 81-82). The court of appeals accepted the district court's findings and affirmed on direct appeal (773 F.2d at 142). Petitioner then filed a petition for a writ of certiorari with this Court. That petition was pending when the Court held in *Batson* v. *Kentucky*, 476 U.S. 79, 96-99 (1986), that the Equal Protection Clause forbids a prosecutor from purposely exercising peremptory challenges to exclude potential jurors solely on account of their race. Following its decision in *Batson*, the Court denied certiorari in this case.

3. Petitioner subsequently filed a motion pursuant to 28 U.S.C. 2255 asking the district court to vacate his conviction and sentence. Petitioner claimed that his right to equal protection was violated by the prosecutor's exercise of peremptory challenges to exclude black veniremen and that the district court violated his right to due process by permitting the prosecutor to explain in an ex parte proceeding the reasons for his peremptory challenges. The district court denied petitioner relief, reasserting its initial conclusion "that racial bias was not responsible for the challenge of the black venirepersons" and finding that the ex parte questioning of the prosecutor was consistent with the procedures set forth in *Batson*. Pet. App. C2-C3.

The court of appeals affirmed. The court first concluded that *Batson* applied retroactively to this case.[1] The

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[1] In *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), the Court held that *Batson* was retroactively applicable to cases pending on direct appeal at the time that case was decided. The conviction in this case was not final, because *Batson* was decided on April 30, 1986, and the petition for a writ of certiorari from petitioner's direct appeal was not denied until July 7, 1986 (*Tucker* v. *United States*, 478 U.S. 1022). See *Allen* v.

court then held that the district court's handling of the *Batson* issue passed constitutional muster, noting that the district court "accurately anticipated the burdens of proof and persuasion set forth in *Batson*, and its procedure certainly was countenanced by that decision" (Pet. App. B12). The court of appeals noted that the Ninth Circuit in *United States* v. *Thompson*, 827 F.2d 1254 (1987), held that *Batson* requires "adversarial hearings once a defendant establishes a prima facie case of purposeful discrimination" unless the challenges would reveal government trial strategy (Pet. App. B11). But the court explained that the Ninth Circuit's "allowance for in camera, ex parte hearings when the prosecution claims that it exercised peremptory challenges pursuant to its case strategy gives the trial court discretion to determine whether an adversarial hearing is required in many, if not most cases" (*ibid.*). Thus, although the court of appeals cautioned district courts to "utilize an adversarial procedure whenever possible," the court agreed with the Sixth Circuit's decision in *United States* v. *Davis*, 809 F.2d 1194 (1987), cert. denied, No. 86-6500 (June 22, 1987), that "it is up to the trial judge to decide what procedure is best-suited for a particular case" (Pet. App. B12).

## ARGUMENT

In *Batson*, this Court expressly "decline[d] * * * to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges" (476

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*Hardy*, 478 U.S. 255, 258 & n.1 (1986) (*Batson* "should not be applied retroactively on collateral review of convictions that became final before our opinion was announced;" "final" means cases in which "the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before" the *Batson* decision).

U.S. at 99). Once a defendant has made a prima facie showing of discrimination, the government must provide an explanation for its peremptory challenges, but there is nothing in the language or the reasoning of *Batson* to suggest that the government's explanation must be made in public or disclosed to the defense. Indeed, the Court made clear in *Batson* that it did not intend to require any particular set of procedures for handling claims of discriminatory use of peremptory challenges (476 U.S. at 99-100 n.24). An explanation of the reasons for the government's peremptory challenges might disclose the government's trial strategy or aspects of its case that the prosecutor believed to be vulnerable. Nothing in *Batson* requires that the government place itself at such a disadvantage. The district court must satisfy itself that the prosecutor was not acting with a discriminatory motive, and the record on which the court bases that finding must be available for review. But where the district court is able to make a finding, on the basis of an explanation in the record, that the prosecutor was acting for non-discriminatory reasons, it is not essential to the fairness of the proceeding or the accuracy of that determination that the prosecutor's explanation be disclosed to the defendant or his attorney in every case.

Neither the district court nor the court of appeals suggested that the prosecutor's statement of reasons should be made outside the presence of the defense in all cases. The court of appeals suggested only that the district court retains the discretion, in appropriate cases, to review the prosecutor's explanation in a non-adversarial setting. If the prosecutor's explanation were questionable, or if it appeared that the defendant's participation in a particular case would be necessary to a fair determination of whether the prosecutor was in fact engaged in discriminatory conduct, the district court would retain the discretion to re-

quire that the prosecutor's explanation be revealed to the defendant and that the defendant be given an opportunity to comment upon or challenge the prosecutor's explanation. In this case, where the record of the in camera hearing left both the district court and the court of appeals with no doubt that the prosecutor's motives were proper, the district court did not abuse its discretion by declining to reveal the details of the in camera proceeding to the defense.[2]

No court of appeals has accepted petitioner's proposed per se rule requiring an adversarial hearing on every *Batson* motion. Rather, the courts of appeals have consistently held that trial courts must be accorded discretion in devising procedures to be used in litigating *Batson* claims. Although the court of appeals affirmed the use of in camera proceedings in this case, the court was careful to point out that "while * * * it is up to the trial judge to

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[2] Petitioner contends (Pet. 35) that defense counsel could have "pointed out where the government's explanations might indicate bad faith or pretext by showing that white jurors similarly situated to the black veniremembers were allowed to serve on the jury." Petitioner, however, had ample opportunity to argue bad faith or pretext both on direct appeal and in his Section 2255 motion. Those arguments were simply unconvincing on the facts of this case and were rightly found to be so by both lower courts. The overall profile of the jurors selected validates the government's explanation that it sought a jury comprised of well-educated persons with significant experience in work or business. Of the jurors and alternates accepted by the government, four had college or post-graduate degrees; five had attended or were presently attending college; four had completed high school and had substantial or responsible employment. Only one alternate juror had less than a high school education. She had completed three and one half years of high school, but her lack of a high school diploma was compensated for by her secretarial skills and work experience. See Answer of the United States to Petition for Rehearing with Suggestion of Rehearing en Banc 4-5.

decide what procedure is best-suited for a particular case, [the court] trust[s] that the trial judge will utilize an adversarial procedure whenever possible" (Pet. App. B12). The court of appeals thus recognized that the circumstances of other cases may require more extensive procedures such as adversarial hearings.

In *United States* v. *Davis,* 809 F.2d at 1201, after examining the surrounding circumstances of the inquiry, the Sixth Circuit held that an ex parte proceeding satisfactorily protected the interests of the defendant under *Batson.* However, the Sixth Circuit recognized that "[t]his is not to say that rebuttal and participation by a defendant in the 'neutral explanation' phase of a *Batson* challenge are always inappropriate" since "the Supreme Court left it up to the trial court to determine what role defendants were to play once the Government proffered its reasons for black juror exclusion" (*id.* at 1202 (footnote omitted)).

In *United States* v. *Thompson,* 827 F.2d at 1258-1259, the Ninth Circuit noted that "ex parte proceedings are anathema in our system of justice and, in the context of a criminal trial, may amount to a denial of due process." Like the court of appeals in this case, however, the *Thompson* court recognized (*id.* at 1257) that "the district judge has broad discretion to fashion and guide the procedures to be followed in cases before him." Indeed, the Ninth Circuit noted that an adversarial hearing would be inappropriate in some cases, such as when the prosecutor's explanation of the reasons for his peremptory challenges would reveal trial strategy. For that reason, although the Ninth Circuit disapproved of conducting *Batson* hearings ex parte as a general rule, it did not adopt a per se rule against such a procedure.

Similarly, the Fourth Circuit in *United States* v. *Garrison,* 849 F.2d 103, 106 (1988), recognized that the need for an adversarial hearing depends on the circumstances of the case, noting that an ex parte hearing was sufficient "where compelling reasons requiring secrecy are shown." The Fourth Circuit cited with approval the court of appeals' decision in this case and agreed that " 'it is up to the trial judge to decide what procedure is best-suited for a particular case' " (*id.* at 107 (quoting Pet. App. B12)). Thus, although there are some differences in emphasis among the courts of appeals that have addressed the issue, the courts are unanimous in rejecting the per se rule advocated by petitioner.[3]

In any event, it is clear that petitioner has now received, in the course of the resolution of his Section 2255 motion, an "adversarial hearing" of the sort contemplated by both the Fourth and the Ninth Circuits. Neither of those courts suggested that the hearing must involve testimony by the prosecutor or be conducted at the time the jury is selected. Thus, the Ninth Circuit in *Thompson* merely remanded to the district court for a post-conviction hearing at which the defendant was to be given an opportunity to respond to the reasons given by the prosecutor for the exercise of his peremptory challenges and argue to the district court that those reasons "may indicate bad faith" or "were legally improper." *Thompson,* 827 F.2d at 1260.[4] See also

[3] Furthermore, all of these court of appeals decisions arose from trials that took place before this Court decided *Batson.* For that reason, and because the court of appeals in this case, the Fourth Circuit, and the Ninth Circuit have held that the trial judge should "utilize an adversarial procedure whenever possible" (Pet. App. B12), we do not expect that the use of ex parte proceedings after *Batson* will be widespread. Review of this issue would therefore be premature at this time.

[4] Although the court noted (827 F.2d at 1259-1260) that "[t]he scope of the proceeding, its duration, and the depth of inquiry are matters

*Garrison*, 849 F.2d at 105 (approving similar post-conviction procedures on *Batson* issue in the context of a motion for a new trial). Respondent has received precisely this sort of adversarial hearing on his *Batson* claim. See n.2, *supra*. He had a transcript of "the prosecutor's articulation of his reasons" and a full opportunity to argue to the district court in his Section 2255 motion "why the articulated reasons [we]re factually unfounded or legally insufficient" (827 F.2d at 1260). No court of appeals has held that a defendant is entitled to more than that or that the "adversarial hearing" must occur prior to trial. Indeed, it is unclear what petitioner is requesting in addition to the procedures he has already received or what, if anything, he could add to the arguments on the merits of his *Batson* claim that the courts below have already considered and rejected.

Petitioner also makes a somewhat obscure challenge (Pet. 37-40) to the clearly erroneous standard applied by the court of appeals in reviewing the conclusion of the district court that the government provided a satisfactory explanation for its exercise of peremptory challenges. Petitioner apparently does not dispute (Pet. 38-39) that such factual findings should ordinarily be reviewed under a clearly erroneous standard. Petitioner contends (Pet. 39-40), however, that, because of the lack of an adversarial proceeding, he was denied "the opportunity even to develop an adequate record" on which such review could be based. Petitioner, however, fails to point to any "additional facts" that might have been necessary to complete

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within the district judge's discretion," the court stressed that it "would be surprised * * * if these proceedings were to involve anything more elaborate than the prosecutor's articulation of his reasons, followed by the argument of defense counsel pointing out why the articulated reasons are factually unfounded or legally insufficient."

the record in this case. During the voir dire, each juror, white and black, gave information in open court about his or her education and employment. Accordingly, the trial court could assess the validity of the prosecutor's reasons for striking the black jurors by comparing the background of the black jurors that the prosecutor struck with the background of the white jurors that the prosecutor either struck or failed to challenge. Petitioner's objection to the adequacy of the record below merely collapses into his per se objection to the ex parte nature of the proceedings and does not depend upon any actual inadequacies in that record.[5]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1988

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[5] This Court has granted certiorari in *Tompkins* v. *Texas*, cert. granted, No. 86-6405 (May 16, 1988), to determine, inter alia, whether an appellate court may defer to the district court's acceptance of the prosecutor's explanations even though the court of appeals found the explanations to be implausible on their face. The petitioner in *Tompkins* has argued (87-6405 Pet. 20) that the Texas Court of Criminal Appeals improperly failed to apply the clearly erroneous standard that ordinarily applies to findings of fact. Petitioner in this case acknowledges (Pet. 37 n.8) that the court below applied the clearly erroneous standard. Thus, it is unnecessary to hold this petition pending resolution of *Tompkins* v. *Texas*.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60684